85-1175

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

Supreme Court, U.S.
FILED
DEC 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

DAVID REECE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. _____
	)	
TENNESSEE CIVIL SERVICE COMMISSION,	)	
	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE COURT OF APPEALS

PETITION OF DAVID REECE FOR A WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Petitioner was denied his constitutional right to the presumption of innocence in the proceedings before the Tennessee Civil Service Commission.

II. Whether T.C.A. §8-30-326 which provides for the dismissal of a state employee "for the good of state service" is unconstitutionally overbroad and void for vagueness in violation of the Fourteenth Amendment to the Constitution of the United States.

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OFFICIAL REPORTS OF COURTS BELOW

The opinion of the Tennessee Court of Appeals in case number 85-117-II and the denial of the Application for Permission to Appeal to the Tennessee Supreme Court are not yet recorded in the Southwestern Reporter. Copies of the above-referred to decisions are appended hereto.

STATEMENT OF THE GROUNDS UPON WHICH JURISDICTION IS INVOKED

This Petition for Writ of Certiorari is brought before the Court upon jurisdiction conferred by 28 U.S.C. §1257. This Petition is timely filed pursuant to 28 U.S.C. §2101(c). The denial of the Application for Permission to Appeal to the Tennessee Supreme Court was filed by the Clerk of the Tennessee Supreme Court on October 28, 1985. No petition for rehearing was sought.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States of America; Tenn. Code Annot. §§8-30-326 and 40-15-102, et seq. are set forth verbatim in the Appendix.

STATEMENT OF THE CASE

David Reece, Petitioner/Appellee, was employed as a correctional sergeant with the Tennessee Department of Correction and stationed at the Bledsoe County Regional Correctional Facility in Pikeville, Tennessee. On or about August 12, 1982, Petitioner was arrested after a routine aerial search for marijuana plants by the Tennessee Highway Patrol disclosed four marijuana plants growing on the edge of the lot next to Petitioner's residence. Petitioner did not rent, lease nor own any of the property where the marijuana was allegedly growing. Petitioner was taken into custody and charged with manufacturing marijuana. Petitioner denies that he had any knowledge of, was aware of or was in any way connected with the marijuana plants found next to his rented lot.

Petitioner was represented on this criminal charge by Thomas Austin, an attorney in Dunlap, Tennessee. Mr. Austin conducted negotiations with District Attorney Pope which led to the Petitioner's entering into a pretrial diversion agreement with no acknowledgement of guilt, pursuant to T.C.A. §40-15-105. This diversion agreement provided, inter

alia that after the expiration of approximately one and one-half months, the charges against Petitioner would be dismissed with prejudice.

The Petitioner successfully completed the terms of the pretrial diversion agreement and the charges against Petitioner were dismissed with prejudice. The records of his arrest were later expunged from the public records on November 15, 1983.

As a result of Petitioner's arrest, on August 12, 1982, Petitioner was suspended without pay from his position with the Department of Correction. On September 22, 1982, Warden Gary J. Livesay of the Bledsoe County Correctional Facility terminated the Petitioner because "the Court failed to exonerate you of the allegations." State's Exhibit 1. Petitioner then filed a timely grievance and this matter was eventually brought before the Tennessee Civil Service Commission on November 16, 1983.

The proof presented by the Department of Correction shows that the sole ground for Petitioner's termination was

his arrest. State's Exhibit 1. No proof was presented which showed that Petitioner was in fact guilty of the offense of which he was charged or that the Petitioner was afforded a hearing on which the issue of innocence or guilt was determined. Instead, testimony of the State's witnesses centered on the fact that Petitioner had engaged in the pretrial diversion agreement and chose not to "exonerate" himself in the criminal courts. (Tr. pp. 34, 35, 91, 97). Conclusory allegations on behalf of the Department of Correction were also presented as "proof" to the effect that because the Petitioner had been arrested he was no longer able to function as a correctional officer. (Tr. pp. 37, 40, 41).

Both Petitioner and his attorney, Thomas Austin, were questioned by members of the Commission as to "why the Petitioner did not want to go into court to prove his innocence" (Tr. p. 87), or "seems like you would try to seek exoneration and the records don't exonerate you." (Tr. p. 88). It was evident by the questioning from the members of the Commission that the Commission did not understand the purpose of the pretrial diversion statutes and the presumption of innocence which attaches to all defendants in criminal

actions. (Tr. pp. 41, 42, 75, 86, 88). Further, it was clear that members of the Commission thought that Petitioner had the duty to clear himself of the charges through a trial and that the pretrial diversion agreement itself was a tacit admission of guilt. (Tr. pp. 86, 87, 88).

The Commission then adopted the findings of fact proposed by the Department of Correction and held that the Petitioner did not exonerate himself from the charges against him. (R. pp. 25-26). Therefore, the termination "for the good of state service" was upheld. (R. pp. 25-26).

Upon judicial review to the Chancery Court of Davidson County, Tennessee, Chancellor C. Allen High issued a memorandum decision on February 8, 1985 (Appendix p. 10) holding that the decision of the Civil Service Commission was not supported by substantial and material evidence. The Chancery Court did not address the other issues raised by the Petitioner; (Petition for Judicial Review - Appendix p. 8) that the Civil Service Commission violated his rights under the state and federal constitutions to the presumption of innocence and that the decision was based upon the consideration of improper evidence. Finally, the Chancery

Court did not address the argument of the Petitioner that T.C.A. §8-30-326 providing for the termination of an employee when the appointing authority considers that the good of service will be served thereby is unconstitutionally vague and impermissibly overbroad.

The Civil Service Commission, at the insistence of the Department of Correction filed an appeal and on August 29, 1985, the Tennessee Court of Appeals entered an opinion (Appendix p. 14) written by Judge Todd reversing the Chancery Court and affirming the decision of the Tennessee Civil Service Commission. The opinion of the Tennessee Court of Appeals without specifically addressing the issue of the constitutionality of the state statute, tacetly approved of the application of the statute in this instance. The Court of Appeals denied a claim that the Petitioner was denied his right to the presumption of innocence.

A timely Application for Permission to Appeal was filed with the Tennessee Supreme Court on September 17, 1985. In a per curim order dated October 28, 1985, the Tennessee

Supreme Court denied the Application for Permission to Appeal. (Appendix p. 26) This Petition for Writ of Certiorari is timely filed.

REASONS FOR GRANTING THE WRIT

I. Petitioner was denied his constitutional right to the presumption of innocence in the proceedings before the Tennessee Civil Service Commission.

Proceedings before the Tennessee Civil Service Commission are governed by the Tennessee adaptation of the Uniform Administrative Procedures Act (T.C.A. §4-5-301, et seq.) This act provides for a de novo hearing for review of an administrative decision to be held at the Civil Service Commission level. The state agency seeking an adverse employment decision against the state employee has the burden of proof before the Civil Service Commission. The Uniform Administrative Procedures Act, which governs the Civil Service Commission hearing, does not establish the burden of proof. Neither do the statutes governing the Civil Service Commission. Absent a statutory provision governing the burden of proof, the common law applies. See, Frank E. Cooper, State Administrative Law, p. 355 (1965). The common law rule is that the moving party has the burden of proof. Id. Since the hearing before the Commission is

de novo, the Tennessee attorney general's office has opined that the state agency (in this case the Tennessee Department of Correction) has the burden of proving facts justifying the disciplinary action or dismissal. (Tennessee Attorney General Opinion, October 12, 1984.)

At the hearing before the Tennessee Civil Service Commission, a state employee is entitled to the right to the presumption of innocence, see Garrity v. New Jersey, 835 U.S. 43, 87 S.Ct. 616, 17 L.Ed 2d 562 (1976). Only such evidence as is admissible in court, (and when necessary to ascertain facts not reasonably susceptible to proof under the rules of court, evidence not admissible thereunder, but of a type commonly relied upon by reasonably prudent person in the conduct of his affairs), can be admitted in the proceedings against an employee before the Civil Service Commission, T.C.A. §4-5-313(1). Despite such provisions, the Tennessee Civil Service Commission denied the Petitioner his constitutional presumption of innocence by considering his entry into a pre-trial diversion agreement as proof of guilt of the underlying charges.

The Tennessee Civil Service Commission erroneously considered the pre-trial diversion agreement entered into by the Petitioner and the Petitioner's alleged "failure to exonerate himself" as evidence of guilt. It is clear from the record that the Commission based its decision not on the conclusory statement of the warden, but on the fact that the Petitioner, in their eyes, "failed to exonerate himself". The record is repleat with references by the Civil Service Commission to the Petitioner's failure to exonerate himself. (Tr. pp. 6, 7, 34, 35, 41-43, 87, 88, 91, 97; Tech. Rec. pp. 20, 23 and 25).

The main offer of proof by the Department of Correction before the Civil Service Commission was the entry by the Petitioner into a pre-trial diversion agreement pursuant to T.C.A. §40-15-101, et seq. This diversion agreement specifically provided no admission of guilt. (Tr. pp. 34, 35, 41-43, 87, 88, 91, 97; Tech. Rec. pp. 23, 25).

The use of the diversion agreement violates the provisions set forth in T.C.A. §40-15-105(a)(3) in that the Memorandum of Understanding was admitted into evidence and used against

the Petitioner. T.C.A. §40-15-105(a)(3) specifically provides that nothing in the Memorandum of Understanding can be used against the Defendant "for any purpose". Further, on November 15, 1983, prior to the Civil Service Commission hearing, all public records relating to the charges against Petitioner were officially expunged pursuant to T.C.A. §40-15-106, which provides that expunged records will not be open for inspection by members of the public. After the matters had been expunged from the public records they ceased to exist except for the limited purposes set forth in T.C.A. §40-15-106.

Further, the "failure of the Petitioner to exonerate himself" cannot be a basis for an adverse employment decision. State employees "are not relegated to a watered-down version of constitutional rights." Garrity v. New Jersey, supra. The Civil Service Commission fundamentally disregarded Petitioner's Fourteenth Amendment rights to the presumption of innocence and the requirement that the State prove guilt of a criminal charge beyond a reasonable doubt. The Civil Service Commission violated the Petitioner's due process in that the Petitioner was not given the benefit of his

presumption of innocence and was being penalized for merely being arrested. The Petitioner took advantage of the pretrial diversion agreement without admitting guilt which is a privilege granted by the Tennessee legislature. T.C.A. §40-15-105, et seq. The Civil Service Commission and the Department of Correction argued time and time again that the Petitioner should have taken steps to exonerate himself from the charges. (Tr. pp. 6, 7, 34, 35, 41-43, 87, 88, 91, 97; R. pp. 20, 23, 25). Such a position violates the Petitioner's due process rights and is plainly inconsistent with the constitutionally rooted presumption of innocence. See, In Re: Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), Cool v. U.S., 409 U.S. 100, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972).

As Mr. Justice Stewart stated in his dissent in Kentucky v. Horton, 441 U.S. 786, 99 S.Ct. 2088, 60 L.Ed.2d 640 at 644 (1979):

> . . . "The principal that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. U.S., 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 41. . . . presumption of innocence "is a basic component of a fair trial under our system of criminal justice." Estelle v. Williams,

435 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126. See also Cool v. U.S., 409 U.S. 100, 104, 93 S.Ct. 354, 34 L.Ed.2d 335. And a fair trial, after all, is what the due process clause of the Fourteenth Amendment above all else guarantees.

> . . . Quite apart from the consideration of the burden or proof, the presumption of innocence "cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusions solely on the legal evidence adduced." 9 Wigmore, Evidence, §2511, p. 407 (3rd Edit. 1940).

It is exactly the emphasis placed on the "arrest, the indictment, and the arraignment", which rendered the Petitioner's hearing before the Civil Service Commission violative of his Fourteenth Amendment rights. For that reason, this Court should grant the Petitioner a Writ of Certiorari to determine if the proceedings before the Tennessee Civil Service Commission denied the Petitioner his constitutional right to the presumption of innocence.

II. Tennessee Code Annotated Section 8-30-326 which provides for the dismissal of a state employee "for the good of state service" is unconstitutionally overbroad and void for vagueness and violates the Petitioner's Fourteenth Amendment rights to due process of law.

A non-criminal statute is not unconstitutionally vague so as to deny due process of law where the statute is set out in terms that an ordinary person exercising ordinary common sense can sufficiently understand and comply with the statute. U.S. Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); Brodrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15, Reh. Denied 417 U.S. 977, 94 S.Ct. 3187, 41 L.Ed.2d 1148 (1974); and Big Fork Mining Company v. Tennessee Water Quality Control Board, 620 S.W.2d 515 (Tenn. App. 1981). This is not the case with T.C.A. §8-30-326 which allows "the appointing authority" to dismiss any regular employee when he "considers that the good of the service will be served thereby." No standards exist and none are set forth in the statute or in the accompanying regulations of the Department of Personnel to determine how the appointing authority will exercise this discretion or what "the good of the service" constitutes.

The Tennessee Court of Appeals recognized this by requiring that the statute be construed to mean that the

consideration of "the good of the service" be for "sufficient reason". (Appendix, p.20). This, however, does not clear the ambiguity created by the overbroad characterization of "good of the service". The court also admitted that no similarly worded statute exists in any other jurisdiction (Appendix, p. 23).

The instant case is a perfect example of how the discretion of the appointing authority can be abused due to the impermissibly overbroad terms of this statute. There has been no evidence other than testimony from the person who took the job action concerning the need to terminate the Petitioner "for the good of state service". There was no evidence presented of any objective manifestation of the allegedly impaired efficiency of the Petitioner. The Court of Appeals now states that the Warden's testimony constituted substantial and material evidence to support the Petitioner's termination.

The testimony of Warden Livesay is at best a mere expression of an opinion unsupported by any objective evidence. The Warden's opinion is subjective and no corroboration was

provided. The Warden testified that merely because the Petitioner was arrested, and that that arrest was the subject of publicity in the news media surrounding the Bledsoe County Regional Prison and that the inmates in the Bledsoe County Regional Prison might have access to newspapers and televisions, the Petitioner's effectiveness as a correctional officer was impaired to the point that he had to be terminated "for the good of state service".

The Warden who was giving this testimony is the very "appointing authority" who made the initial decision to terminate the Petitioner. His testimony was not supported by any objective evidence showing that the Petitioner's effectiveness was impaired or even that the information concerning the Petitioner's arrest was actually communicated to inmates or correctional officers at the Bledsoe Prison. There was no corroboration from any source that the Petitioner's usefulness was in any way impaired. Even if this knowledge was made available to the inmates and other correctional officers, no proof was presented showing an identifiable impact on the Petitioner's ability to function. What the Commission was presented with was a supervisor

who fired an employee been qualified as the expert to say that the employee should be fired.

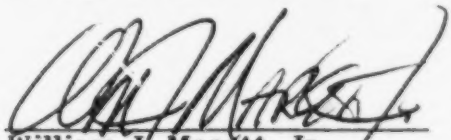
What the Tennessee Court of Appeals misses, however, is that there was no evidence that any impairment of the usefulness of the Petitioner to the state. "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Redding v. Conally Ford, Inc., 662 S.W.2d 938 (Tenn. App. 1983) and Nicholas v. Provident Life & Accident Insurance Company, 61 Tenn. App. 633, 557 S.W.2d 536 (1970). The conclusary statements of Warden Livesay are not supported by any identifiable evidence, nor was Warden Livesay's testimony corroborated by any other objective evidence or testimony. There was no evidence presented whatsoever that the publicity which occurred as a result of the Petitioner's arrest was ever dissiminated to members of the inmate population or correctional staff, or that the ability of the Petitioner to serve the state of Tennessee as a correctional officer was in any way impaired by such publicity.

T.C.A. §8-30-326, in this case, clearly allows for an overbroad interpretation. Therefore, this Court should therefore grant the Petitioner's Petition for a Writ of Certiorari in order to review T.C.A. §8-30-326 to determine if it is unconstitutionally overvoid and void for vagueness in violation of the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

For the above and foregoing reasons, the Petitioner prays that this Honorable Court grant him a Writ of Certiorari to review the decision of the Tennessee Court of Appeals.

Respectfully submitted,



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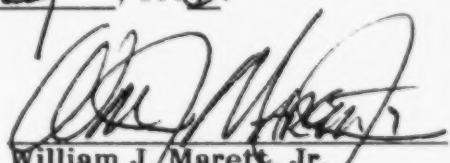
CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and exact copy of the foregoing has been mailed, postage prepaid, to Wayne Uhl, Esq., Assistant Tennessee Attorney General, 450 James Robertson Parkway, Nashville, Tennessee, 37219, on this the 7th day of January, 1986.



William J. Marett, Jr.

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OCTOBER TERM, 1985

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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE COURT OF APPEALS

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APPENDIX

CONSTITUTION OF THE UNITED STATES

AMENDMENT 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TENNESSEE CODE ANNOTATED

8-30-326. **Dismissal.** - An appointing authority may dismiss any regular employee in his division when he considers that the good of the service will be served thereby. No dismissal of a regular employee shall take effect, unless at least ten (10) days before the effective date thereof the appointing authority gives notice to such employee and files a written statement with the commissioner. The employee

shall have an opportunity to file with the appointing authority a written statement regarding the proposed dismissal, a copy of which shall be filed with the commissioner. A regular employee who is dismissed shall have the right to appeal to the commission in the manner provided in 8-30-327. If the commissioner determines that the statement of reasons for a dismissal given by the appointing authority shows that such dismissal does not reflect discredit on the employee dismissed, the name of such employee shall, if he so requests, be placed on the appropriate reemployment list or lists.

40-15-102. **Pretrial diversion meetings.** - The parties to any possible criminal trial may meet to discuss the possibility of pretrial diversion contained herein.

40-15-103. **Deferrring pending proceedings.** - Upon stipulation of the parties, the court shall defer for a reasonable time any pending proceedings in the prosecution so that the procedures under §§40-15-102 - 40-15-105 may be pursued.

40-15-104. **Pretrial investigation.** - (a) Upon stipulation of the parties, the trial court by order may direct any county

or municipal, or authorized private agency, available for this purpose, or the state department of correction if no local agency is available to conduct an investigation of the defendant's background. Provided, however, in counties having a metropolitan form of government and in counties having a population of over six hundred thousand (600,000) according to the 1970 federal census of population or any subsequent federal census, the county, municipal, or authorized private agency shall conduct any investigation of the defendant's background, but, the provisions of this sentence shall be implemented within the existing level of funding to the department of corrections. The order shall specify the purpose and scope of the procedure and the matters to be covered, and shall direct that the results of any investigation be embodied in a written report, copies of which shall be made available to the parties.

(b) In counties where there is a pre-trial release program in operation, the agency responsible for the operation of that program shall be the agency to conduct the background investigation ordered by the court and the order shall so stipulate. Provided, further, that in counties which have a local county probation officer paid for by local funds, said

county probation officer shall be the agency responsible for conducting background investigation as ordered by the trial court.

40-15-105. **Memorandum of understanding - Suspended prosecution.** - (a) Memorandum Of Understanding Permitted. (1) In cases where the defendant is charged with a misdemeanor or felony and does not have a prior misdemeanor conviction for which a sentence of confinement is served or a prior felony conviction within the five (5) year period after completing the sentence or probationary program for such prior conviction, and does not have a previous misdemeanor conviction for which a sentence of confinement is served or a previous felony conviction with the exception of a conviction for driving while intoxicated as prohibited by §55-10-401, the parties may by a memorandum of understanding agree that the prosecution will be suspended for a specified period, not to exceed two (2) years from the filing of memorandum of understanding, for any offense the maximum punishment for which is confinement for ten (10) years or less and/or a fine, on condition that the defendant pay ten dollars ($10.00) per month as part payment of expenses incurred by the agency,

department, program, group or association in supervising him, such payments to be made to the agency, department, program, group, or association responsible for the supervision of such defendant.

A defendant may be granted pretrial diversion only one (1) time under the provisions of this chapter.

(2) Provided, that prosecution of the defendant shall not be suspended unless the parties, in the memorandum of understanding, also agree that the defendant observe one or more following conditions during the period in which the prosecution is suspended:

(A) That he not commit any offense;

(B) That he not engage in specified activities, conduct and associations, bearing a relationship to the conduct upon which the charge against him is based;

(C) That he participate in a supervised rehabilitation program which may include treatment, counseling, training and education;

(D) That in the proper case he make restitution in a specified manner for harm or loss caused by

the offense, if restitution is within his capabilities;

(E) That he pay court costs in a specified manner;

(F) That he pay, in addition to the payment of ten dollars ($10.00) per month required by this section, any or all additional costs of his supervision, counseling or treatment in a specified manner, based upon his ability to pay;

(G) That he reside in a designated place, including but not limited to a residental facility for persons participating in a particular program of rehabilitation if residence there is necessary in order to participate fully in the program; and

(H) That he conduct himself in any specified manner consistent with good citizenship, or other terms and conditions as may be agreed upon by the parties.

(3) The memorandum of understanding may include stipulations concerning the admissibility in evidence of specified testimony, evidence, or depositions if the suspension of the prosecution is terminated and there is a trial on the charge, however, no confession or admission against interest of the defendant obtained during the pendency of and relative

to the charges contained in the memorandum of understanding shall be admissible in evidence for any purpose, including cross-examination of the defendant. The memorandum of understanding shall be in writing signed by the parties and state that the defendant waives his right to a speedy trial, and his right to be indicted at any particular term of court. This filing shall toll any applicable statute of limitations during the pendecy of the diversionary period.

(4) Such pretrial diversion procedures are hereby authorized and a memorandum of understanding may be permitted in the municipal courts of home rule municipalities where the defendant is charged with a misdemeanor and does not have a previous misdemeanor or felony conviction within the five (5) year period after completing the sentence or probationary program for such prior conviction. Such procedures in such courts shall be subject to the same terms and conditions, including those related to expenses and costs, hereinabove set forth and any expenses and costs paid by such defendants shall be paid to the clerk of the municipal court in which the proceedings were held.

(b) Filing Of Memorandum Of Understanding And Notice. (1) Promptly after the memorandum of understanding is made, the prosecuting attorney shall file it with the court together with a notice stating that pursuant to memorandum of understanding of the parties under this section and §§40-15-102 - 40-15-104, the prosecution is suspended for a period specified in the notice. Upon this filing, if the defendant is in custody he may be released on bond or on his promise to appear if the suspension of prosecution is terminated and there is a trial on the charge. The memorandum of understanding must be approved by the trial court before it shall be of any force and effect.

(2) The trial court shall approve the memorandum of understanding unless:

(A) Prosecution has acted arbitrarily and capriciously;

(B) The memorandum of understanding was obtained by fraud; or

(C) The diversion of the case is unlawful.

(3) The defendant shall have a right to petition for a writ of certiorari to the trial court for an abuse of

prosecutorial discretion. If the trial court finds that the prosecuting attorney has abused his discretion in failing to divert, the trial court may order the prosecuting attorney to place the defendant in a diversion status on such terms and conditions as the trial court may order. A defendant diverted under such terms and circumstances may be terminated as provided by subsection (d) and shall be subject to all other provisions of this section.

(c) Modification Of Memorandum Of Understanding By Mutual Consent. The parties by mutual consent may modify the terms of the memorandum of understanding at any time before its termination. Nothing herein shall prohibit a behavioral contract or agreement setting out behavior or goals expected of and to be achieved by the defendant made between a counselor and defendant, but such agreement need not be filed with the court.

(d) Termination Of Memorandum Of Understanding - Resumption Of Prosecution. The memorandum of understanding shall be terminated and the prosecution may resume as if there had been no memorandum of understanding

if either the defendant or prosecuting attorney files a notice that the memorandum of understanding is terminated. If the memorandum of understanding is terminated by the prosecution the defendant may petition the court to review the action of the prosecution to determine whether the prosecution acted arbitrarily, capriciously or abused its discretion to terminate. If the court so finds it may order the defendant reinstated under his memorandum of understanding or order the pending charges dismissed with or without jeopardy attaching.

(e) Dismissal With Prejudice. The trial court shall dismiss with prejudice any warrant or charge against the defendant upon the expiration of ninety (90) days after the expiration of the period of suspension specified in the memorandum of understanding is filed, provided no termination of the memorandum of understanding has been filed under the provisions of subsection (d). If the prosecution is dismissed with prejudice, jeopardy shall attach and the court shall make a minute entry to that effect.

40-15-106. **Expunging records.** - (a) Upon petition by a defendant in the court which entered a nolle prosequi in this case the court shall order all public records expunged.

(b) Public records, for the purpose of expunction only, shall not include arrest histories, investigative reports, intelligence information of law-enforcement agencies, or files of district attorneys general that are maintained as confidential records for law enforcement purposes and are not open for inspection by members of the public.

(c)(1) Release of such confidential records or information contained therein other than to law-enforcement agencies for law-enforcement purposes shall be a misdemeanor.

(2) This section shall not be construed to deny access to any record to the comptroller of the treasury or his agent for purposes of audit investigation; the comptroller or his agent having such access shall protect the confidential nature of any such records which are not otherwise public under other statutes.

(3) Release of arrest histories of a defendant or potential witness in a criminal proceeding to an attorney of record in the proceeding shall be made to such attorney upon request.

IN THE CHANCERY COURT
FOR DAVIDSON COUNTY, TENNESSEE

DAVID REECE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No.**_____
	)	
TENNESSEE CIVIL SERVICE COMMISSION,	)	
	)	
	)	
Respondent.	)	

PETITION FOR REVIEW ORDER OF THE TENNESSEE CIVIL SERVICE COMMISSION

Now comes David Reece, Petitioner, by and through his attorney, and shows the Court as follows:

1. David Reece is a resident of Pikeville, Bledsoe County, Tennessee, and, until his termination, served as a correctional sergeant and held a supervisory position at the Bledsoe Regional Prison operated by the Tennessee Department of Corrections.

2. August 12, 1982 Petitioner was arrested and charged with manufacturing marijuana.

3. On September 22, 1982 Petitioner entered into a pretrial diversion agreed order pursuant to TCA Section 40-15-102 et seq.

4. On November 15, 1983 the General Sessions Court for Bledsoe County, Tennessee, entered an order dismissing the action against Petitioner and expunged all records relevant thereto pursuant to TCA Section 40-15-106.

5. On September 22, 1982 Petitioner was dismissed by Warden Livesay of the Bledsoe Correctional Facility from service with the Department of Corrections.

6. A hearing before the Tennessee Civil Service Commission was held on Petitioner's termination on November 16, 1983. In an order entered December 2, 1983 the Commission upheld the dismissal of Petitioner "on the basis of personal conduct detrimental to state service and unbecoming a state employee."

7. Said action of the Tennessee Civil Service Commission represents a decision which (1) violates the statutory provisions of TCA Section 40-15-105(a)(3) in that statements of the agreed order of pretrial diversion were ruled admissible evidence before the Tennessee Civil Service Commission hearing. Further, said use violates the provisions of TCA Section 40-15-106 in that said records were used after an order of expungement was entered by the General

Sessions Court of Bledsoe County, Tennessee; (2) that the ground used by the Tennessee Civil Service Commission for upholding the dismissal of the Petitioner, to wit: "personal conduct detrimental to state service and unbecoming a state employee" is unconstitutionally vague and constitutes a violation of the Tennessee and federal constitutions.

8. The decision of the Tennessee Civil Service Commission represents an abuse of the discretion in that matters deemed not admissible by TCA Section 40-51-2 et seq. were allowed into evidence and used as a basis for upholding Petitioner's dismissal.

9. The decision of the Tennessee Civil Service Commission is unsupported by admissible material evidence.

WHEREFORE, Petitioner prays that the order of the Tennessee Civil Service Commission entered on December 2, 1983 be reversed and Petitioner be reinstated to his former position with the Department of Corrections; that Petitioner be awarded back pay and reinstatement of annual leave; and for attorney's fees and costs of this action.

Petitioner further prays for the opportunity to amend this Petition prior to the time set for hearing and for such

other and further relief as this Court deems just and equitable.

WOODS, BRYAN, WOODS &
WATSON, A Professional
Law Association

By: /s/ William J. Marett, Jr.
William J. Marett, Jr.

Attorney for Petitioner

121 Seventeenth Avenue South
Nashville, Tennessee 37219
(615) 259-4366

DAVID REECE	)
	) **IN THE CHANCERY COURT**
VS. NO. 84-128-II	) **FOR THE STATE OF**
	) **TENNESSEE, TWENTIETH**
	) **JUDICIAL DISTRICT,**
TENNESSEE CIVIL SERVICE COMMISSION	) **DAVIDSON COUNTY,**
	) **PART II**

MEMORANDUM

This is an appeal from the decision of the Tennessee Civil Service Commission upholding plaintiff's termination of employment by the Tennessee Department of Correction.

FINDINGS OF FACT

Plaintiff was employed as a correctional sergeant, a supervisory position, at the Bledsoe County Regional Correctional Facility in Pikeville. He had been employed there for over three years and had a good work record. On August 12, 1982, the Tennessee Highway Patrol discovered four or five marijuana plants growing about 75 feet behind

plaintiff's house.*

Plaintiff was arrested and charged with growing marijuana. There was much publicity surrounding plaintiff's arrest and charge. Warden Livesay, the warden at the Bledsoe Facility, placed plaintiff on an indefinite suspension without pay from his job. Plaintiff denied that he had any knowledge of the marijuana plants.

On September 22, 1982, plaintiff entered into a pre-trial diversion agreement pursuant to T.C.A. §40-15-105. The agreement stated that the case against plaintiff would be continued until November 1, 1982, at which time the charges would be dismissed if the plaintiff had no violations of the law. On the same date, Warden Livesay terminated plaintiff's employment because "the court failed to exonerate you of

---

*/ It is not clear from the record whether or not the plants were growing on property owned or leased by plaintiff.

the allegations" and "the nature and awareness of these charges would greatly affect your ability to perform the duties of a Correctional Sergeant."

On November 1, 1982, plaintiff successfully completed the pre-trial diversion program. The charges were dismissed and the record of his arrest was expunged on November 15, 1982.

Plaintiff filed a timely grievance of his termination. A Level IV grievance hearing was held on November 5, 1982, and plaintiff's termination was upheld by the Commissioner of the Department. The Civil Service Commission's findings of fact include the statement that during this grievance hearing, "the petitioner admitted that marijuana was in fact growing on his property." This finding is unsupported by any facts in the record before the Court.

The Civil Service Commission heard plaintiff's appeal of his termination on November 16, 1983, and determined by a vote of two to one, to uphold the termination.

CONCLUSIONS OF LAW

The primary issue presented is whether there is substantial and material evidence supporting the Commission's decision to uphold plaintiff's termination. After a thorough review of the entire record, the Court concludes that there is no substantial and material evidence that plaintiff was guilty of misconduct. The only proof presented was that plaintiff was arrested, his arrest received much local publicity, that this publicity could affect his ability to perform his job, and that plaintiff participated in a pre-trial diversion agreement. Plaintiff consistently denied any wrongdoing and no proof was presented of plaintiff's culpability.

Plaintiff was a regular state employee holding a civil service position of a permanent nature. Under this Court's reading of T.C.A. §8-30-328, the role of the Civil Service Commission was to determine whether or not the plaintiff was guilty of the charges made by the Department of Correction, that is, whether plaintiff engaged in personal conduct which rendered him unable to adequately perform his job. There is no substantial and material evidence in

the record that plaintiff was guilty of that charge.

Since the Court has resolved the first issue in plaintiff's favor, it is unnecessary to address the remaining issues raised by plaintiff.

The decision of the Civil Service Commission will be reversed. This case will be remanded for the Civil Service Commission to determine whether plaintiff shall be allowed back pay and attorney's fees in accordance with T.C.A. §8-30-328(e) and (f). The attorney for plaintiff will prepare the order taxing costs to the Commission.

/s/ C. Allen High
C. ALLEN HIGH
CHANCELLOR

February 8, 1984

cc: Michael Parsons
William J. Marett, Jr.

DAVID REECE,	)	
	)	
Petitioner-Appellee	)	
	)	
vs.	)	Davidson Equity
	)	CofA No. 85-117-II
TENNESSEE CIVIL SERVICE COMMISISON,	)	
	)	
	)	
Respondent-Appellant.	)	

COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM CHANCERY COURT OF

DAVIDSON COUNTY, TENNESSEE

AT NASHVILLE

HONORABLE C. ALLEN HIGH, CHANCELLOR

FILED: August 29, 1985

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HENRY F. TODD
PRESIDING JUDGE,
MIDDLE SECTION

CONCUR:

SAMUEL L. LEWIS, JUDGE
BEN H. CANTRELL, JUDGE

REVERSED AND REMANDED

DAVID REECE,	)	
	)	
Petitioner-Appellee	)	
	)	
vs.	)	**Davidson Equity**
	)	**CofA No. 85-117-II**
TENNESSEE CIVIL SERVICE COMMISISON,	)	
	)	
	)	
Respondent-Appellant.	)	

OPINION

This is a judicial review of an administrative decision of the Tennessee Civil Service Commission which affirmed the dismissal of the plaintiff from his position as correctional sergeant at the Bledsoe Regional Prison, a facility of the Tennessee Department of Corrections.

On September 22, 1982, plaintiff was served by the Warden of the Bledsoe Prison with notice of termination stating the reason therefor as follows:

> You were placed on indefinite suspension on August 12, 1982 due to your arrest and charge of "Manufacturing Marijuana". We were informed today by Attorney General William Pope that you were tried in Bledsoe County General Sessions Court and the court failed to exonerate you of the

allegations. I feel that the nature and awareness of these charges would greatly affect your ability to perform the duties of a Correctional Sergeant. Because of this, I feel that I must terminate your employment.

On November 8, 1982, following a "grievance hearing", the Commissioner of Corrections affirmed the dismissal. On November 16, 1982, plaintiff appealed to the Civil Service Commission.

On November 16, 1983, one year later, a hearing was held before the Civil Service Commission which entered its order on December 2, 1983, affirming the dismissal. On petition for review, the Chancellor reversed, and the State appealed.

The sole issue stated by appellant is whether the decision of the Commission is supported by substantial and material evidence.

The Trial Court and this Court on Appeal are required by the provisions of the Uniform Administrative Procedure Act to review the findings of fact of an administrative agency

upon a standard of substantial and material evidence and to consider the entire record, including any part detracting from evidence supporting the findings of the agency, but may not review issues of fact de novo or substitute the judgment of the court for that of the agency as to the weight of the evidence. TCA §§ 4-523 (g, h), 4-524. Humana of Tennessee v. Tennessee Health Care Facilities Commission, Et Al, Tenn. 1977, 551 SW2d 664.

The gravamen of the grounds for dismissal was not that plaintiff was guilty of unlawful involvement with marijuana but that a prosecution had been duly initiated by police officers involving arrest of plaintiff on some charges involving marijuana, that this arrest received intenstive publicity in the area of plaintiff's employment, and that the prosecution was terminated without exoneration of plaintiff, resulting in such impairment of his usefulness as required his discharge "for the good of the service".

At the hearing before the Commission, no effort was made by the State to prove guilt. The order of the Commission contains the following:

6. A level IV Grievance Hearing was conducted by Mr. Evans G. Fine, Director Offender Classification, on November 5, 1982. During the hearing, the petitioner admitted that marijuana was in fact growing on his property.

No evidence is found in this record to support the above finding which must therefore be disregarded.

Other findings of the Commission which are supported by substantial and material evidence are as follows:

(1) Prior to his separation from State service, Correctional Sergeant, David Reece, held a supervisory position at Bledsoe Regional Prison.

(2) On August 12, 1982, Sergeant Reece was arrested at his home and charged with manufacturing marijuana. The arrest received extensive media coverage in the Bledsoe County area.

(3) Sergeant Reece was placed on suspension pending an investigation of these charges.

(4) On September 22, 1982, Mr. Reece entered into an Agreed Order pursuant to TCA 40-15-102 et. seq. (Pretrial Diversion). The agreement continued the case until November, 1982.

(5) On September 22, 1982, Warden Livesay determined that the petitioner could not effectively perform the duties of a Correctional Officer and Supervisor because he was not exonerated of the allegations.

There is evidence that plaintiff was arrested at his home on a charge of "manufacturing marijuana", that the arrest,

as well as the discovery of marijuana plants in proximity to plaintiff's home received considerable publicity through radio, TV and press media, all of which publicity was disseminated in the small County of Bledsoe and small community of Pikeville where plaintiff lived and worked. Although the arrest warrant is not in this record, other records of the General Sessions Court of Bledsoe County indicate that, on September 22, 1982, plaintiff appeared before the General Sessions Judge and signed a "Memorandum of Understanding" that he would not be tried on a charge of growing marijuana pending his participation in a Pre-Trial Diversion Program under TCA § 40-2105 et. seq. and that the case was continued to November 1, 1982. There is further evidence that a charge against plaintiff of "Viol. of T.C.A. 52-1432(a)(1)(F)(Growing Marijuana)" was dismissed on September 22, 1982 and that Plaintiff paid $41.50 court costs on the same date. There is also evidence, that, on November 15, 1983, the Circuit Judge of Bledsoe County entered an order captioned "State of Tennessee vs. David Reece" reciting that:

> The Court having approved an agreed order on September 22, 1982, and the Defendant having

> complied with said order and mroe than ninety (90) days having lapsed since said order was entered, the parties hereby agree that the above styled case should be dismissed as shown by the court records and pursuant to T.C.A. §40-15-106 all public records allowable under said code section be expunged.
>
> IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the above styled cause is hereby dismissed as shown by the Court records, and all public records allowable under T.C.A. §40-15-106 are hereby expunged.

There is evidence that plaintiff was employed as correction sergeant, which position requires that he supervise an entire "shift" of security personnel and, in the absence of his lieutenant twice a week, to be in charge of the entire Bledsoe Regional Prison which has some 630 inmates, and 200 to 250 employees of whom 173 are security personnel.

There is evidence that the inmates have radios and television sets, that news of the arrest and charges against plaintiff was readily available to inmates and employees, and that:

> [A]nybody that lives in Bledsoe County ought to know how gossip gets. . and if a man is innocent and doing his job, people can make it look like he ain't doing it.

There is also evidence that Bledsoe County is plaintiff's "home": that he was born there, lived a time in Chattanooga, spent some time in the armed services and returned to Bledsoe County.

There is also evidence from the warden of the facility that plaintiff's position was one of trust in many respects including attitude of inmates, attitude of subordinates, and trust from superiors not only in supervising security but in preventing and reporting breaches of security including introduction of drugs into the institution. The warden stated that, even if a not guilty verdict had been rendered, something of a cloud would have remained over plaintiff such that his ability to supervise would have been impaired; and that the particular disposition of the prosecution left unanswered the question of guilt or innocence so as to destroy plaintiff's usefulness to the institution.

Plaintiff's brief asserts correctly that pre-trial diversion involves no acknowledgement of guilt. However, it is probable that uninformed members of the public regard the procedure as involving some admission of guilt. As stated above, plaintiff was not discharged because of acknowledgement of guilt.

Plaintiff's brief next asserts correctly that the record of the prosecution has been "expunged". However, there is no evidence that the termination of the prosecution under the circumstances or the "expungement of the record" was ever communicated to the public or had any effect whatsoever upon the image of plaintiff in the mind of the inmates and fellow employees of plaintiff.

Plaintiff's brief also asserts (erroneously) that the State insists that the failure of plaintiff to "exonerate himself" (by not guilty plea, trial and not guilty verdict) is evidence of guilt. This is not the theory of the State. The premise of the State, which is supported by the evidence and by common sense, is that whenever a public official is accused of wrongdoing, especially that which closely affects his public duties, his public image is marred because of a suspicion of guilt which is not allayed or removed without a conclusive determination of the fact of guilt or innocence. This is the position in which plaintiff, or any other public official finds himself once he has been charged, falsely or otherwise, and the charges have received the usual venomous publicity. For the superios of such public employee, the issue is not guilt or innocence, but usefulness or uselessness.

Plaintiff next insists that the testimony of plaintiff's superior, the warden, was not "substantial evidence" that plaintiff's usefulness had been so impaired as to justify his termination. The warden's qualifications were impressive: Bachelor's and Master's degrees in sociology and psychology, counselor at Brushy Mountain Prison, counselor and later Warden of Knoxville Community Service Center, Warden of Bledsoe Regional Prison for four years. The warden explained in full detail the relation between unresolved "shadows" upon the integrity of a corrections officer and the response of others to his efforts to supervise. The reasoning of the warden is confirmed by the reasoning of an ordinarily prudent person, as represented by the membership of the Commission.

T.C.A. § 8-30-26 provides in pertinent part as follows:

> Dismissal — An appointing authority may dismiss any regular employee in his division when he considers that the good of the service will be served thereby. . . .

Taken literally, the statute reads that it is sufficient that the superior "considers" that the good of the service

will be served by dismissal. However, the clear and necessary import of the statute is that the superior must "consider" for sufficient reason that the good of the service will be served. Such sufficient reason is shown in the present case.

Plaintiff next complains that members of the Commission demonstrated their own inclination to approve the dismissal merely because plaintiff failed to exonerate himself. Whatever the motive of the questions asked by the commissioners, they were justified, either upon the testimony of the warden or upon the exercise of their common sense in concluding that plaintiff's usefulness had been seriously impaired by the unresolved public accusations against him and that the "good of the service would be served" by his termination.

Plaintiff conceives that this Court is in some manner bound by the supposed finding of the Chancellor that the testimony of the warden was not "substantial and material evidence". Such is not the law relating to this appeal. No finding of fact is involved, either in Chancery Court or in this Court. No question of credibility is involved before either Court, because there was no viva voce testimony in either

Court. The question before the Chancery Court and upon appeal to this Court is a question of law as to the sufficiency of the evidence presented to the Commission and preserved in its record. The opinion in Metro Govt. of Nashville, etc. v. Shacklett, Tenn. 1977, 554 SW2d 601, contains nothing contrary to the foregoing.

Plaintiff argues that, upon being expunged, the record of his arrest and subsequent proceedings ceased to exist for the purpose of this proceeding. This arguments is not entirely consistent with the introduction of such records by plaintiff as part of his testimony. However, the existence or non existence of the records or the occurrence or non occurrence of the arrest are immaterial to this proceeding; for, as stated heretofore, the gravaman of the grounds of dismissal was the publicity accorded to the accusation and its effect upon usefulness of plaintiff in the particular public position held by him.

The diversion agreement is not the ground of discharge, although a refusal to sign it, insistence upon a trial and ultimate acquittal, if sufficiently publicized, would have mitigated

the effect of the derogatory publicity. The signing of the order of dismissal on September 22, 1982, convinced plaintiff's superior that there would be no judicial mitigation of the effects of the derogatory publicity.

Plaintiff cites Garrity v. New Jersey, 835 US 43, 87 S Ct 616 17 L.Ed.2d 562 (1976), wherein police officers were questioned by the Attorney General about irregularities in the performance of their duties after receiving a Miranda Warning. Some of the answers given were used as evidence in a criminal proceeding against the officers in which they were convicted. The Supreme Court reversed the convictions on the ground that the statements of defendants were coerced because the state statute provided that the officers would be subject to removal from office for failing to testify or pleading the 5th amendment. The cited authority is readily distinguishable from the present case in which no confession was obtained and no prosecution, evidentiary ruling or conviction is being reviewed.

The present case is a civil case involving discharge "for the good of the service" and not for the commission of any crime.

While not precisely in point, Stone v. Commonwealth, (Pa. Cmnwlth. 1980) 422 A2d 1227, was a review of a civil service approval of dismissal of a prison guard for possession of marijuana at a state correctional institution. There was no statutory authorization for discharge "for the good of the service", but only for misconduct or "other substantial reasons". The employee was a guard and not a supervisor, the incident occurred at an institution rather than a home, and guilt was apparently established. In affirming the dismissal, the Pennsylvania Court said:

> In the instant case, appellant's possession of marijuana violated the parameters of the sensitive position which he held and cast doubt on his "competency and ability" to execute his duties, sufficient to warrant removal for cause. 422 A2d at 1228.

In Dept. of Justice v. Grant, 22 Pa Cmnwlth 582, 350 A2d 878 (1976) a corrections officer was released from service upon being found in an automobile which was used in a robbery and which contained a stolen handgun. The Appellate Court affirmed and said:

> The appellant in the case at bar was employed to guard prisoners in a state correctional facility; this

is a highly sensitive position which requires those who would hold it to avoid even the appearance of impropiety. 350 A2 at 880.

Diligent search has failed to disclose any published authority directly upon the issue presented herein, namely, where the statute authorizes discharge "for the good of the service" may an employee be discharged without a finding of some misconduct on his own part and solely upon the basis of impairment or destruction of his usefulness by factors independent of his misconduct?

No authorities have been found which involve a statute or regulation containing the words, "for the good of the service" or their equivalent.

In Nephew v. Wills, 298 Mich 187, 298 NW 376, 135 ALR 1340 (1941), a discharge was upheld where the employee married with knowledge of a rule which made marriage a ground for termination. The regulation in question provided for discharge "for any cause... which, in the opinion of the person with authority... may interfere with the efficient discharge of his duty".

In Bradford v. Dept. of Hospitals, 255 La 888, 233 So2d 553 (1970), it was held that after exhaustion of sick leave, the continued inability of an employee to perform his duties was legal cause for dismissal.

It must be conceded that the public payroll cannot be made a haven for those who with or without fault have become unable to perform the duties for which they were employed. It must likewise be conceded that "the good of the service" may in proper cases justify or require the discharge of public employees when their efficiency or usefulness in their positions has been seriously impaired by their own fault, by the fault of others, or by blameless misfortune.

For example, could a prison be required to continue the employment of a lookout on the wall who had lost most of his eyesight in an accident not of his own making?

As another example, if a prison chaplain should be accused of an act of base immorality, and the accusation is widely publicized within and without the walls, should the chaplain expect to be retained simply because he is not criminally prosecuted?

Although necessary for the present decision, a strong argument can be made for the proposition that public employees whose reputation is vital to their usefulness have a duty to actively respond to any adverse publicity, particularly prosecution for crime, and to take reasonable steps to salvage and rehabilitate their reputation and usefulness. If this be a reasonable duty, then the failure to perform it may amount to a form of passive misconduct contributing to the disability which requires discharge.

The issues in this case are not without doubt, and are not easily resolved; witness one dissent on the Civil Service Commission and the decision of the Chancellor.

The determinative factor is which of two considerations predominate: (1) the right of the State to maintain an efficient, effective correction institution for the protection of the public, or (2) the right of the individual employee to retain his position until he has been proven guilty of misconduct. It is the view of this Court that the first consideration must prevail over the second.

In this view of the case arguments as to presumptions of innocence and burden of proof as to guilt become moot.

The members of this Court sympathize with any employee who may be discharged without proof of misconduct; but the interest of the public requires this sacrifice of public employees when their usefulness has been seriously impaired with or without fault.

The judgment of the Chancellor is reversed. The decision of the Civil Service Commission is affirmed. All costs, including costs of this appeal are taxed against the plaintiff. The cause is remanded to the Chancery Court for such further proceedings, if any, as may be necessary and proper.

Reversed and remanded.

/s/ HENRY F. TODD
HENRY F. TODD
PRESIDING JUDGE
MIDDLE SECTION

CONCUR:

/s/ SAMUEL L. LEWIS
SAMUEL L. LEWIS, JUDGE

/s/ BEN H. CANTRELL
BEN H. CANTRELL, JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

DAVID REECE,	)	
	)	
Appellant,	)	
	)	
vs.	)	Davidson Equity
	)	
TENNESSEE CIVIL SERVICE COMMISSION,	)	
	)	
	)	
Appellee.	)	

ORDER

Upon consideration of the application for permission to appeal filed by the Appellant and the answer of the Appellee, the briefs of counsel and the entire record, the Court is of the opinion that the application should be and the same is hereby denied.

Costs will be borne by the Appellant.

PER CURIAM